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It follows, therefore, that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature, as the District Judge seems to have thought, and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative. Accordingly, where the submission has been made a rule of Court and the right is one which falls under the latter description, the proceedings must, under section 361 of the Code of Civil Procedure, be held not to abate by reason of the death of a party. And as the right to partition which is the subject-matter of the submission in the present case would survive to the deceased plaintiff's adopted son, if there is one, the District Judge should have proceeded under section 367 of the Code of Civil Procedure.

We accordingly set aside his order and direct that the application be restored to his file and dealt with according to law. The costs of this appeal will be costs in the case.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SHANMUGAM PILLAI (PETITIONER), APPELLANT,

v.

SYED GULAM GHOSE (RESPONDENT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 43—Suit on muchilika for rent for fasli 1305—Previous suit on different muchilika for rent for fasli 1306—Maintainability.

Plaintiff, the inaudar of a village, sued to recover from defendant, one of his mirasidars, arrears of melvaram due for fasli 1305, under a registered muchilika. On its being pleaded, in defence, that plaintiff had already filed a suit in respect of fasli 1306:

* Appeals Nos. 4, 5, 6 and 7 of 1903 under section 15 of the Letters Patent presented against the judgment of Mr. Justice Subrahmanya Ayyar, dated 17th December 1902, in Civil Revision Petitions Nos. 18, 19, 20 and 21 of 1902, presented against the decrees of P. S. Gurumurti, Subordinate Judge of Kumbakonam, in Small Cause Suits Nos. 501, 502, 503 and 510 of 1901.

Held, that the present suit was barred by section 43 of the Code of Civil Procedure. Though there were separate muchilikas for the faslis 1306 and 1305, yet there was but one cause of action, namely, the non-payment of rent by a tenant to his landlord.

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Suit for rent. The Subordinate Judge gave the following judgment:—

“ Plaintiff, Inamdar of the Sarvamaniam villages of Valuthur, &c., sued to recover from the defendant, one of his mirasidars, Rs. 477-12-8 being arrears of melvaram due for fasli 1305 under a registered muchilika for five years executed by the defendant on 20th May 1891. The defendant disputed the value of paddy as also the claim for faslijasti and interest. He also pleaded set-off and added that the suit was barred by section 43 of the Code of Civil Procedure as a suit for fasli 1306 had been filed already. I think the objection under section 43, Code of Civil Procedure, is untenable. This suit is on a registered muchilika which gives six years’ time to sue for the rents as they fall due, whereas the other suit (Original Suit No. 64 of 1900 on the file of this Court) for rent of fasli 1306, as admitted between the parties, was on a patta and a revenue judgment based thereon which allow plaintiff only three years’ time to sue for the rent they refer to. Causes of action and limitation periods are different in each case and so I think the plea of bar under section 43 is untenable.” He gave judgment for plaintiff :

Defendant filed a civil revision petition which came on for hearing before Subrahmania Ayyar, J., who held that the Subordinate Judge was right in deciding that this suit was not based on the same cause of action as that on which the suit for the rent for the fasli 1306 had been based. He dismissed the petition.

Petitioner preferred this appeal under article 15 of the Letters Patent.

Mr. Joseph Satya Nadar for appellant.

C. Ramachandra Rau Sahib for respondent.

JUDGMENT.—We do not think that the orders of the Subordinate Judge and of this Court which are appealed against can be supported. Though there were separate muchilikas for faslis 1306 and 1305, yet there was but one cause of action, viz., non-payment of rent by a tenant to his landlord. Though the rents became payable under different documents and at different times, they are only different claims under the same cause of action or tenancy. The case is very similar to the case where several articles are sold

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in succession by A to B. If the vendor sues for the price he must sue for the price of all the goods sold up to the date of his suit and cannot sue separately first for one and then for another. *Chockalinga Pillai v. Kumera Viruthalam*(1) and *Grimby v. Aykroyd*(2) there quoted. Section 43 of the Civil Procedure Code is a bar to the second suit.

We set aside the order of this Court appealed against and the decree of the Subordinate Judge and dismiss the suits with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1903.
March 27.
April 2.

GOMATHAM ALAMELU (PETITIONER—PLAINTIFF), APPELLANT,

v.

KOMANDUR KRISHNAMACHARLU (SECOND COUNTER-
PETITIONER—SECOND DEFENDANT), RESPONDENT.*

Jurisdiction—Suit on mortgage—Land situated outside territorial jurisdiction of Court—Court otherwise competent to entertain suit—Decree passed without objection—Execution of decree.

A suit on a mortgage was instituted in the Court of the District Munsif at Nellore, which was competent to try a suit of its nature and value; but the mortgaged lands were situated within the jurisdiction of the Court of the District Munsif at Tirupati. A decree was passed for the amount due and for sale, no objection being raised as to want of jurisdiction of the Nellore Court to try the case. When the decree-holder applied for an order absolute and for execution of the decree, objection was taken that the Court had no jurisdiction to entertain the suit, and that the decree passed by it could neither be made absolute nor be executed:

Held, that the decree was not a mere nullity, and inasmuch as no objection had been taken to the entertainment of the suit before the decree had been passed, the judgment-debtor should not be allowed to object to the validity of the decree in the course of its execution.

(1) 4 Mad. H.C.R., 334.

(2) 1 Exch., 479.

* Civil Miscellaneous Second Appeal No. 43 of 1902, presented against the order of T. M. Swaminatha Ayyar, District Judge of Nellore, dated 25th November 1901, in Appeal Suit No. 85 of 1901, presented against the order of T. M. Rungachari, District Munsif of Nellore, in Miscellaneous Petition No. 122 of 1901 in Original Suit No. 40 of 1898,